IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

No. 74-1582

Sherry White ..... *Appellant*

V.

Kenneth O. Hughes ..... *Appellee*

JURISDICTIONAL STATEMENT

Appeal From The
Supreme Court of Arkansas

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IN THE

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Appeal From The
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1 JURISDICTIONAL STATEMENT

A. OPINIONS BELOW

1. The appellant Sherry White respectfully appeals from a judgment adverse to her cause rendered by the Supreme Court of Arkansas, *White v. Hughes*, 257 Ark. 627, 519 S.W.2d 70 (1975) and is attached hereto as Exhibit A.

B. JURISDICTION

1. The sole issue in this case is the Constitutionality of the Arkansas Guest Statute.

2. The judgment of the Arkansas Supreme Court was entered February 17, 1975, and rehearing was denied March 17, 1975. Notice of Appeal was timely filed May 1, 1975, with the Supreme Court of Arkansas.

3. The jurisdiction of the Supreme Court is invoked under U.S. Code Annotated, Title 28, §1257, which provides that:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

4. The following cases are relied upon for sustaining the court's jurisdiction:

Abie State Bank v. Weaver
282 U.S. 765 (1931)

Louisville Railroad Co. v. Melton
218 U.S. 36 (1910)

Zucht v. King
260 U.S. 174 (1922)

Silver v. Silver
280 U.S. 117 (1929)

Royster Guano Co. v. Virginia
253 U.S. 560 (1920)

Reed v. Reed
404 U.S. 71 (1971)

5. (a) One Arkansas Guest Statute at issue provides:

> "No person transported as a guest in any automotive vehicle upon the public highways or in aircraft being flown in the air, or while upon the ground, shall have a cause of action against the owner or operator of such vehicle, or aircraft, for damage on account of any injury, death or loss occasioned by the operation of such automotive vehicle or aircraft unless such vehicle or aircraft was wilfully and wantonly operated in disregard of the rights of others. (Ark. Acts 1935, No. 61, Ark. Stat. Ann. §75-913 (1957 Repl.)

(b) The other Arkansas Guest Statute at issue provides:

> "No person transported or proposed to be transported by the owner or operator of a motor vehicle as a guest, without payment for such transportation, nor the husband, widow, executors, administrators or next of kin of such person, shall have a cause of action for damages against such owner or operator, or other persons responsible for the operation of such car, for personal injury, including death resulting therefrom, by persons while in, entering, or leaving such motor vehicle, unless such injury shall have been caused by the wilful misconduct of such owner or operator. And in no event shall any person related by blood or marriage within the third degree of consanguinity of affinity to such owner or operator, or the husband,

widow, legal representative, or heirs of such person, have a cause of action for personal injury, including death resulting therefrom, against such owner or operator while in, entering, or leaving such motor vehicle, provided this act shall not apply to public carriers." (Ark. Acts. 1935, No. 179, Sec. 1, p. 481; Ark. Stats. Ann. §75-915 (1957 Repl.).

The above statutes have been held synonymous. *Scott v. Shairrick*, 225 Ark. 59, 279 S.W.2d 39 (1955).

C QUESTION PRESENTED

The sole question at issue is the Constitutionality of the Arkansas Guest Statutes.

It is the contention of appellant that the Arkansas Guest Statutes violate the following provision of the Fourteenth Amendment to the Constitution of the United States:

1. Section 1.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

D. STATEMENT OF THE CASE

The sole issue in this case is the constitutionality of the Arkansas Guest Statutes. Sherry White was a guest in an automobile being driven by Kenneth O. Hughes. Their

vehicle was proceeding west on Interstate 30 in Pulaski County. A second vehicle being driven by Mrs. Louise Murphy had stopped on the shoulder of Interstate 30, facing west, with the left front and rear wheels on the freeway. Appellee, Hughes, saw the Murphy vehicle when he was approximately 150 yards from the Murphy car. Hughes was engrossed in an argument with appellant, he made no attempt to slow down, to stop his vehicle nor to go around the Murphy car. He struck it from the left rear.

Appellant and appellee were nineteen years of age. They had been dating but had broken up. They were going to a movie on this particular evening and, hopefully, would part as friends. When appellee appeared at appellant's home to escort her to the movie, he had not shaved. Appellant insisted that if appellee wanted to take her out he would have to go home and shave. They drove to appellee's home, he shaved, returned to the automobile, was irritated and angry with the appellant for being this strict on his personal appearance. Appellee drove his automobile at a high rate of speed from Lakewood where he lived to the ramp of Interstate 30. Appellant begged Appellee to slow down or to take her home. Appellee refused. Appellee proceeded on to Interstate 30 where the accident occurred.

Appellee stated that he was going fifty-five miles per hour at the time of the collision. He denied that he had testified in Municipal Court that he was going eighty miles per hour at the time of impact.

After the collision, appellee dragged appellent from the car, still angry and being of a high temper, he banged appellant's head repeatedly against the shoulder of the highway, notwithstanding appellant's face was severely

lacerated, was bleeding profusely, had a broken jaw and other injuries.

Each time appellant would protest or attempt to say something, appellee would tell her to "shut your goddamn mouth".

State jurisdictions are divided on the Constitutionality of the guest statute. Whether a guest in an automobile, traveling across the United States, has a remedy at law for injuries sustained due to the negligence of his host driver depends upon the view which the Supreme Court of the state where the accident occurred has of *Silver v. Silver, supra*, a 1929 decision by the Supreme Court of the United States. Many states have abandoned *Silver*. Other states have indicated as has the Arkansas Supreme Court, *White v. Hughes*, 257 Ark. 627, 519 S.W.2d 70, that the guest statute will be held Constitutional pending a review of *Silver* by the Supreme Court of the United States. *Justice v. Gatchell*, 325 A. 2d 97 (Del. 1974).

The challenge to the Connecticut Guest Statute in *Silver, supra*, was limited. The argument was that the classification of the guests in automobiles as distinguished from guests in other vehicles was arbitrary. The other classes of vehicles in 1929 being trains and trolley cars and horsedrawn vehicles. In the case at bar and in those cases where the courts have declined to follow *Silver* on the Constitutional issue, the challenge is to the discrimination between paying and non-paying guests in an automobile; between the guest in one automobile and the guest in a second automobile with which the first vehicle collides; between the guest in an automobile and the pedestrian; between the guest and the driver of a second vehicle; and

between a guest in an automobile and a guest in a boat on a navigable stream.

Some of the state courts holding that the guest statute is in violation of the Fourteenth Amendment to the Constitution of the Unites States are as follows:

Brown v. Merlo, 8 Cal. 3rd 855, 506 P. 2d 212 (1973); *Henry v. Bauder*, 213 Kan. 594, 581 P. 2d 362 (1974); *Johnson v. Hassett*, 217 N.W.2d 771 (N. D. 1974); *Thompson v. Hagan*, 96 Idaho 19, 523 P. 2d 1365 (1974).

Given the opportunity, the United States Circuit Court of Appeals for the Eighth Circuit Court declined to apply the guest statute in an admiralty case on Constitutional grounds. The case of *Moye v. Henderson et al*, 496 F. 2d 973 (1974), Cert. Den., 419 U.S. 884 (1974), upheld the United States District Judge and refused to apply the Arkansas Guest Statute to a boating accident on the Arkansas River. In affirming the trial court's decision, the Court of Appeals stated:

> "The Arkansas Statute limiting the recovery for social guests on boats would defeat that federal right of recovery and thus may not be applied in an Admiralty Court. In addition, Arkansas is the only state with a boat guest statute currently in force."

In referring to a similar boat guest statute in California, which had been held unconstitutional, the Circuit Court of Appeals in *Moye* (supra) went on to state as follows:

> "The statute, and all other guest statutes, in California, have been declared unconstitutional as a violation of equal protection under the Fourteenth Amendment and thus are no longer operative."

The New Hampshire Supreme Court refused to apply the guest statute in a case where the accident occurred in Vermont. *Clark v. Clark*, 107 N.H. 351, 222 A. 2d 205 (1966). Chief Justice Kenison explained that the guest statute, enacted in the 1920's and 1930's, are "no longer characteristic of our automotive society" and "they contradict the spirit of the times". See Leflar, Conflict of Laws: The Choice Influencing Considerations, 28 Ark. L. Rev. 2, Prosser, Law of Torts (4th Ed. 1971) p. 187; Allen, Why Do Courts Coddle Ins. Cos., (1927) 61 Am. L. Rev. 77; White, the Liability of an Automobile Driver to a Non-Paying Passenger, 20 Va. L. Rev. 326 (1934); Weinstein, Should We Kill the Guest Passenger Act, 33 U. Det. L. Rev. 185 (1965).

Dean William Prosser, the great tort authority, made the following comment about the automobile guest statutes in his Law of Torts (4th Ed. 1971):

"Such statutes have been the result of persistent and effective lobbying on the part of liability insurance companies. The chief argument advanced in support of them has been that in guest cases the insurer, who is required to pay the damages, is peculiarly exposed to collusion between the injured guest and a host anxious to see compensation paid, so long as he does not have to pay it—so that the truth does not come out in court, and there is a resulting increase in insurance rates. Essentially, however, the theory of the acts is that one who receives a gratuitous favor in the form of a free ride has no right to demand that his host shall exercise ordinary care not to injure him. The typical guest act case is that of the driver who offers his friend a lift to the office or invites him out to dinner, negligently drives him into a collision, and fractures

his skull—after which the driver and his insurance company take refuge in the statute, step out of the picture, and leave the guest to bear his own loss. If this is good social policy, it at least appears under a novel front."

The case at bar was submitted to the jury under the Arkansas Model Instructions which included the following:

"Sherry White claims damages from Kenneth O. Hughes and has the burden of proving each of three essential propositions:

First, that she has sustained damages;

Second, that Kenneth O. Hughes operated his vehicle willfully and wantonly in disregard of the rights of others; and

Third, that such willful and wanton conduct was a proximate cause of the damages of Sherry White".

The above instruction (AMI-205) was read to the jury over the specific objection of appellant, as follows:

Appellant's attorney:

"I am objecting to the giving of either AMI-203 or AMI-205 on the ground that it is unconstitutional. If Sherry White had been a passenger in the Murphy vehicle, she could sustain a cause of action against Hughes on the ground of simple negligence. Had she been on a joint venture with Hughes, she could sustain a cause of action against Hughes on ordinary negligence. Being a guest, she is denied this remedy and, as such, denied equal protection of the law and due process of law."

The court then proceeded to give AMI-401 as follows:

> "To establish that Kenneth Hughes was guilty of misconduct, Sherry White has the burden of proving that Kenneth Hughes knew or reasonably should have known in the light of the surrounding circumstances that his conduct would naturally or probably result in injury and that he continued such conduct in reckless disregard of the consequences. It is not necessary, however, for Sherry White to prove that Kenneth Hughes intended to injure her."

The above instruction was read to the jury by the court over the specific objection of appellant's attorney, as indicated:

> Appellant's Attorney:
>
> "I am objecting to the giving of AMI-401 on the ground that it is unconstitutional. If Sherry White had been a passenger in the Murphy vehicle, she could sustain a cause of action against Hughes on the ground of simple negligence. Had she been on a joint venture with Hughes, she could sustain a cause of action against Hughes on ordinary negligence. Being a guest, she is denied this remedy and, as such, denied equal protection of the law and due process of law."
>
> The Court:
>
> "The same Constitutional objection is made to the Court's giving instruction AMI-401 as was made by Mr. McMath to AMI-205." (R. 102-103)

The jury returned a verdict for the defendant, Kenneth O. Hughes, and judgment was so entered. (R. 7)

The appellant appealed the judgment to the Supreme Court of Arkansas, where it was affirmed.

The Arkansas Supreme Court, in upholding the Constitutionality of the guest statute, stated:

> "If the rule of *Silver v. Silver, supra*, the highest authority on the equal protection clause, is to be changed and the structures of the Fourteenth Amendment extended in this area of the law, *we shall await the views of the Supreme Court of the United States on the subject.*" (Emphasis supplied) See Appendix A.

E. THE FEDERAL QUESTION IS SUBSTANTIAL

The Fourteenth Amendment to the United States Constitution expresses in essence the spirit and heart of our Constitutional government. All citizens are equal before the law. No citizen is to be discriminated against by the law. No citizen is to receive privileges and immunities not belonging to all citizens.

The guest statute by design and intent was created for the purpose of denying a guest in an automobile his common-law right to be compensated for the injury caused by the negligence of his host driver. The burden which this guest statute has imposed upon the injured and maimed and mutilated is incalculable. The hardships imposed upon widows and orphans whose bread-winner was killed by a host driver is shocking to the conscience of all who believe in equal justice before the law.

While denying to the guest passenger his common-law remedy, the guest statute grants to the host driver the privilege of immunity unless his conduct is so wilful and

wanton as to constitute an almost intentional infliction of harm.

This denial of a common-law right to the gratuitous guest in an automobile is not denied to the paying guest. Neither is this right denied to the guest in a second automobile involved in a two-automobile collision. Neither is the right denied to the driver of a second automobile or to a pedestrian on the highway or to a guest in the home of a host.

CONCLUSION

The injustice of the guest statute lies not alone in the fact that it draws distinctions between paying and non-paying passengers, but also in the fact that it penalizes guests by wholly depriving them of protection against negligent injury. We urge that a non-paying passenger in an automobile is wholly and undeniably discriminated against so long as his operator owes him a lesser standard of care than to the operator or passenger of other vehicles, to the paying passenger, even to the owner of personal property, should damage occur to the property while in transit by reason of the operator's ordinary negligence.

How is the police power of the state to regulate traffic served by this guest statute? We respectfully submit that the time has come for this Court to review the guest statute and to reconsider the considerable inequities and hardships imposed upon innocent victims by the guest statute.

Over and above the interest of the parties in the case at bar, there is an urgent need for more uniformity in the

law as it relates to the constitutional rights of guests in automobiles as they engage in a hazardous pursuit, as they move to and fro across the width and breadth of the United States.

Respectfully submitted,

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EXHIBIT A

SUPREME COURT of ARKANSAS

No. 74-258

Opinion Delivered Feb. 17, 1975

Sherry White, Appellant

V.

Kenneth O. Hughes, Appellee

Appeal From Pulaski Circuit Court, Tom F. Digby, Circuit Judge

Affirmed

CONLEY BYRD, Associate Justice

The appellant, Sherry White, a high school cheerleader, beauty queen and model, was a guest in an automobile driven by her boy friend, the appellee Kenneth O. Hughes when a collision occurred with an automobile parked partly on and partly off the freeway. The trial court submitted the issues to the jury in accordance with our guest statute, Ark. Stat. Ann. §75-913 (Repl. 1957), which denies a recovery to a guest except for willful and wanton negligence. The jury found the issues in favor of appellee. For reversal appellant contends only that the guest statute, *supra*, is unconstitutional, being in violation

of article 2, §18 of the Arkansas Constitution and the equal protection clause of the United States Constitution.

The constitutionality of our guest statute was upheld in *Roberson v. Roberson*, 193 Ark. 669, 101 S.W.2d 961 (1937), as against the argument that it contravened article 2, §18 of the Arkansas Constitution. A similar statute has been upheld as against the equal protection clause of the United States Constitution in *Silver v. Silver*, 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed. 221 (1919). Appellant recognizes the foregoing authorities, but as predicted by the case notes in 49 Notre Dame Law 446 and 48 Tul. L. Rev. 419, she suggests we should follow the lead of the Supreme Court of California in *Brown v. Merlo*, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P. 2d 212 (1973), and reconsider the inequities and hardships imposed upon innocent victims by the guest statute. In the *Merlo* case, *supra*, the California guest statute was held in violation of the equal protection clause. The Texas Court of Civil Appeals in *Tisko v. Harrison*, 500 S.W.2d 565 (Tex. Civ. App. 1973), after critizing the *Merlo* case, *supra*, concluded that the Texas guest statute did not violate the equal protection clause. The Supreme Courts of Kansas, *Henry v. Bauder*, 213 Kan. 751, 518 P. 2d 362 (1974), Utah, *Cannon v. Oviatt*, ____Utah___, 520 P. 2d 883 (1974), Idaho, *Thompson v. Hagan*, ____Idaho ___523 P. 2d 1365 (1974) and North Dakota, *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974), followed *Merlo*, *supra*, in striking down their guest statutes. The Supreme Courts of Iowa, *Keasling v. Thompson*, ____Iowa ___, 217 N.W.2d 687 (1974), Colorado, *Richardson v. Hanson*, ____Colo.____, 527 P. 2d 536 (1974), Oregon, *Duerst v. Limbocker*, ____Or.____, 525 P. 2d 99 (1974) and Delaware, *Justice v. Gatchell*, ____Del.___, 325 A. 2d 97 (1974), followed the

Texas Court in *Tisko v. Harrison, supra,* in upholding their guest statutes.

Upon the authorities cited we cannot say that the guest statute, *supra,* has no fair and rational relation to the legislative objectives sought to be controlled and like the Delaware Court, *Justice v. Gatchell, supra,* we take the view that if the rule of *Silver v. Silver, supra,* the highest authority on the equal protection clause, "is to be changed and the strictures of the Fourteenth Amendment extended in this area of the law, we shall await the views of the United States Supreme Court on the subject."

Affirmed.

Supreme Court, U. S.
FILED
JUL 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

No. 74-1582

Sherry White ..... *Appellant*

V.

Kenneth O. Hughes ..... *Appellee*

APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS APPEAL

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No. 74-1582

Sherry White ..... *Appellant*

V.

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APPEAL FROM THE
SUPREME COURT OF ARKANSAS

MOTION TO DISMISS APPEAL

JURISDICTIONAL STATEMENT

A.

This appeal is from the final judgment of the Arkansas Supreme Court in the case of *White v. Hughes*, 257 Ark. 627, 519 S.W.2d 70 (March 17, 1975). Appellant asserts jurisdiction is conferred by U.S. Code Annotated, Title 28, §1257 (2).

QUESTION PRESENTED

B.

The sole question presented is the constitutionality of the Arkansas Guest Statutes under the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

C.

This appeal arises out of an action for personal injuries filed by Sherry White against Kenneth O. Hughes. The accident occurred on August 25, 1970, in Little Rock, Arkansas. It is undisputed that at the time of the accident, Miss White was a social guest in an automobile being driven by Mr. Hughes.

Appellee does not believe it is relevant to the issues on appeal to recite in detail the facts of the accident. Suffice it to say that defendant denied the allegations of profanity and other misconduct detailed in appellant's brief and the jury found in his favor.

Appellant's counsel raised the constitutionality of the two Arkansas Guest Statutes by specific objections to two separate instructions which incorporated the provisions of the Act. These objections were overruled by the trial court whose ruling was affirmed by the Arkansas Supreme Court.

MOTION TO DISMISS

D.

Appellee moves the Court to dismiss the appeal on the grounds it does not present a substantial federal question.

Appellant's appeal is premised on the single contention that the Arkansas Guest Statutes contravene the Fourteenth Amendment of the United States Constitution. This precise contention as to the almost identical Connecticut statute was unanimously rejected by this Court in *Silver v. Silver*, 280 U.S. 117, 74 L. Ed. 221, 51 S. Ct. 57.

Although appellant seeks to distinguish the *Silver* case on the basis that her attack is "broader" than that which was made in *Silver*, it is obvious that to grant the relief sought by appellant this Court will have to overrule its prior decision. Appellant argues that *Silver* should be overruled on the basis that the Supreme Courts of four states have, in testing their respective guest statutes under the relevant state constitutional provisions, found them in violation of varying constitutional prohibitions. Appellee recognizes that under our federal system of government, a state in construing its own constitution may apply broader or more liberal tests of constitutionality than are imposed upon them by the Fourteenth Amendment. This is obviously the approach taken by the Supreme Courts of California, Kansas, North Dakota and Idaho. However, just as clearly, the overwhelming majority of the Supreme Courts in those states which have enacted guest statutes have adopted verbatim the rationale of *Silver*, in regard to both State and Federal constitutional provisions. See, e.g., *Keasling*

v. Thompson, 217 N.W.2d 687 (Iowa, 1974); *Duerst v. Limbocker*, 525 P. 2d 99 (Ore., 1974); *Justice v. Gatchell*, 325 A. 2d 97 (Del., 1974); *Richardson v. Hanson*, 527 P. 2d 536 (Col., 1974); *Cannon v. Oviatl*, 520 P. 2d 883 (Utah, 1974); *Tisko v. Harrison*, 500 S.W.2d 565 (Tex. Civ. App., 1973); *Delaney v. Badame*, 274 N.E.2d 353 (Ill., 1973); *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581; *Smith v. Williams*, 51 Ohio App. 464, 1 N.E.2d 643; *Tulghum v. Bleakley*, 177 S.C. 286, 181 S.E. 30; *Roberson v. Roberson*, 193 Ark. 669, 101 S.W.2d 965; *Shea v. Olsen*, 175 Wash. 143, 53 P. 2d 615.

As to appellant's contention that the Court should reconsider *Silver* on the basis of the new, broader attack typified by *Brown v. Merlo*, 8 Cal. 3d 855, 106 Cal. Rept. 388, 506 P. 2d 212 (1973), appellee respectfully submits that the recent dismissal of the appeal to this Court in the case of *Cannon v. Oviatl*, 520 P.2d 883 (Utah, 1974), *appeal dismissed*, 42 L. Ed. 2d 37, 95 S. Ct. 24, is clear authority for a dismissal in this case. In *Cannon*, the Utah Supreme Court examined the *Brown v. Merlo* rationale and concluded that it was not in harmony with the requirements of the Fourteenth Amendment. The Court noted in pertinent part:

> "The use of the motor vehicle upon the highways has validly been subjected to legislative regulation. The presence of the guest in this area would itself create a basis for a distinct classification from other guests located where there was no overwhelming public interest. The motor vehicle exerts a dominant influence in contemporary society and its use creates many economic and social problems. In a state such as Utah a significant portion of our economic resources must be devoted to the construction and maintenance; the economic burden

> bears a direct relationship to the number of vehicles and the total cumulative mileage on the highways each year. The guest statute encourages hospitality and directly effects the number of vehicles present on the highways; thus avoiding traffic congestion and wear on the surface of the roadway. The guest statute promotes the conservation of petroleum and other natural resources consumed in highway travel. The suggestion that the burden of the injured should be borne by the motoring public through liability insurance is an economic and social solution that is properly subject to legislative determination. The legislature is the proper forum to consider the alternative problem of the injured guest."

The plaintiff appealed to this Court from the above decision. On October 15, 1974, the appeal was dismissed on the ground it did not present a substantial federal question, (42 L. Ed. 2d 37, 95 S. Ct. 24). Appellee respectfully submits this dismissal is a clear reaffirmance by this Court of the long-standing and well-recognized rationale of *Silver*, and that this appeal should, likewise, be dismissed.

Respectfully submitted,

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